

NTSB Order No. EA-5147

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 22nd day of March, 2005

Respondent.

Docket SE-16850

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William E. Fowler, Jr., on September 17, 2003, following an evidentiary hearing.<sup>1</sup> The law judge affirmed the alleged violations of 14 C.F.R. 91.131(a), 91.139(c) and 91.13(a),<sup>2</sup> but dismissed the alleged violation of

<sup>2</sup> Section 91.131(a)(1) prohibits operations in Class B airspace without an appropriate air traffic control (ATC) clearance. Section 91.139(c) prohibits operations within

7701

Section 91.103(a),<sup>3</sup> and modified the sanction from a 150-day suspension, as requested by the Administrator, to a 110-day suspension of respondent's pilot certificate.

In her March 11, 2003, order of suspension, the Administrator alleged that on September 23, 2001, respondent operated a Piper PA-28-180 within the Baltimore-Washington Class B airspace<sup>4</sup> without having received an ATC clearance from the appropriate ATC facility. The Administrator further alleged that respondent failed to comply with FAA NOTAM Number FDC 1/0356, which prohibited the operation of VFR aircraft in enhanced Class B airspace.<sup>5</sup> Respondent did not deny these allegations, but argued at the hearing that his actions should be excused because an emergency situation existed.<sup>6</sup>

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airspace designated in an emergency rule announced in a NOTAM, except in accordance with the authorizations, terms, and conditions prescribed in the rule covered by the NOTAM. Section 91.13(a) prohibits operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup> Section 91.103 requires the pilot-in-command, before beginning a flight, to become familiar with all available information concerning the flight.

<sup>4</sup> The FAA's *Pilots Handbook of Aeronautical Knowledge* describes Class B airspace as the airspace from the surface to 10,000 feet msl surrounding the nation's busiest airports, plus two or more upper layers of airspace that are wider but do not reach to the surface. Accordingly, Class B airspace often resembles an upside-down wedding cake.

<sup>5</sup> Enhanced Class B airspace includes the airspace from the surface to the base of Class B airspace. (Transcript (Tr.) 37, and Exhibit A-4.)

<sup>6</sup> Pursuant to 14 C.F.R. Section 91.3(b), in an in-flight emergency requiring immediate action, the pilot-in-command may deviate from any rule in Part 91 to the extent required to meet  
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Specifically, respondent asserted that he became concerned and nervous after the controller asked him whether he was on a training flight following his request for an ATC clearance to descend and land at Bay Bridge Airport,<sup>7</sup> which was located within enhanced Class B airspace. A NOTAM issued just after September 11, 2001, prohibited VFR flights into this airspace. However, an exception to this prohibition for VFR training flights prompted the controller to ask respondent whether he was on a training flight. Respondent replied to the controller that he was not on a training flight. According to respondent, after making this transmission he lost radio communication with the controller and, therefore, would not have heard the controller say that he was unable to issue respondent the requested clearance into the enhanced Class B airspace surrounding the Bay Bridge Airport.

Respondent testified that the subject flight was only his second after September 11, 2001, and given the recency of those events and the extraordinary security measures that were in effect as a result, he was somewhat apprehensive. Accordingly, respondent indicated, when he heard the controller ask if he was on a training flight (a question respondent said he considered unusual), immediately followed by the loss of radio communication, he became alarmed and feared another terrorist

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that emergency.

<sup>7</sup> Respondent and his passenger were on a flight from Mecklenburg, Virginia to Bay Bridge Airport in Stevensville, Maryland.

attack might be occurring.<sup>8</sup> Respondent testified that after he landed at Bay Bridge Airport he found his radios were again operational. In his appeal brief he acknowledges that the reason his radios stopped working in flight was, "probably because he inadvertently rendered [them] inoperative." Respondent admitted that after he lost radio communication in flight he failed to use his transponder to transmit the code for lost communications (7600), and that this was a mistake. (Tr. 116.)

The Administrator presented testimony from FAA operations inspector William Voss who indicated that he did not think the controller's question or respondent's subsequent loss of radio communication constituted an emergency situation that justified entering Class B airspace without a clearance. The law judge agreed, finding that "there was no emergency situation," that would excuse respondent's unauthorized entry into Class B and enhanced Class B airspace in violation of sections 91.131(a)(1), 91.139(c) and 91.13(a)(1). However, he found that respondent had adequately familiarized himself with all available information before the flight and, therefore, had not violated section 91.103(a). He reduced the suspension of respondent's pilot certificate from 150 days to 110 days.<sup>9</sup>

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<sup>8</sup> Respondent stated that he thought the controller might have asked the question as a way to convey in code a warning message about a terrorist attack (Tr. 120), and that his subsequent loss of radio communication might also have been related to such an attack.

<sup>9</sup> The Administrator withdrew her appeal from the reduction in sanction.

On appeal, respondent reiterates his emergency defense, and asserts that the emergency was created by the controller's "bizarre and inapplicable" question, which respondent characterizes as a mistake.<sup>10</sup> He also claims that Inspector Voss supported his position by testifying that respondent did exactly what he should have done under the circumstances by landing at the nearest available airport. In reply, the Administrator disputes respondent's claim that these circumstances constituted an emergency. As explained below, we agree with the Administrator and deny the appeal.

Neither the controller's question nor respondent's loss of radio communication can be considered the type of emergency that justifies respondent's entry into Class B or enhanced Class B airspace. As indicated by the law judge in his decision, even though respondent may have believed he was in an emergency, this was not a reasonable belief. (We agree with the law judge's observation that respondent was "not thinking clearly and wisely". Tr. 180.) The fact that the controller's question may have been unnecessary (in that training flights were not allowed into Bay Bridge Airport) is irrelevant to the issue of whether respondent reasonably thought he was in an emergency situation.

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<sup>10</sup> NOTAM FDC 1/0345 (Exhibit R-1) apparently exempted certain areas of enhanced Class B airspace, including the area surrounding Bay Bridge Airport, from the training flight exception. Accordingly, respondent argues, since (contrary to the controller's understanding) training flights were **not** allowed into Bay Bridge Airport, the controller's question was unnecessary.

Respondent obviously was not fully informed about the contents of the NOTAM prohibiting flight into enhanced Class B airspace without a clearance.<sup>11</sup> Accordingly, he would not likely have known whether the controller's question was apropos.

But even assuming respondent's belief that an emergency situation existed was reasonable, it is apparent that this belief would have been quickly dispelled if respondent had remained in radio contact with the controller. Respondent admits his loss of radio contact was a situation of his own making. Therefore, it does not qualify as an emergency that justifies his violations, and the propriety of his subsequent landing at Bay Bridge Airport is immaterial.<sup>12</sup> In this regard, we note that, contrary to respondent's suggestion, Inspector Voss did not testify that respondent behaved appropriately in every way. To the contrary, he emphasized that the factors respondent cited (the controller's question and his loss of radios) did not justify his entry into Class B and enhanced Class B airspace without an ATC clearance. However, Inspector Voss testified that, once he found himself in that situation, respondent did the right thing by landing at the

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<sup>11</sup> Respondent testified that he did not realize VFR flights were not permitted to land at Bay Bridge Airport (Tr. 129), indicating that he did not understand the import of NOTAM FDC 1/0356 (Exhibit A-4).

<sup>12</sup> Violations are not excused by a situation of the pilot's own making. Accordingly, the fact that respondent may have acted wisely in some respects after finding himself in the predicament he created does not mitigate his culpability for his unwise actions. See Administrator v. Sidicane, 3 NTSB 2447, 2451 (1980) (the necessity or prudence of actions taken to extricate respondent from a situation of his own making is entirely

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nearest airport.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's initial decision is affirmed; and
3. The 110-day suspension of respondent's pilot certificate will begin 30 days after the service date indicated on this opinion and order.<sup>13</sup>

ROSENKER, Acting Chairman, and CARMODY, ENGLEMAN CONNERS, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.

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irrelevant to establishing his defense).

<sup>13</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(g).